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CPLR 602: Consolidation of Actions Pending in Different Inferior Courts Refused by the Supreme Court

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ARTICLE 5 — VENUE

CPLR 503(c): Corporation's office as filed with Secretary of State recognized proper for venue purposes.

Under prior law, an authorized foreign corporation was not considered a resident for venue purposes, but was treated as any other nonresident.[54] CPLR 503(c) dictates that proper venue is to be laid, for domestic corporations or authorized foreign corporations, in the county where its "principal office" is located. In *General Precision, Inc. v. Ametek, Inc.*,[55] the defendant sought a change of venue, claiming that the "principal office" for venue purposes of the plaintiff-corporation was as designated in the certificate filed with the Secretary of State. Defendant's contention was sustained despite the fact that the actual location of plaintiff's principal office was in a county different from the one designated in the certificate filed with the Secretary.

Most authorities anticipated such a result due to the interplay of CPLR 503(c) and BCL § 102(a)(10).[56] The latter section defines "office of a corporation" as the office registered with the Secretary of State, notwithstanding the existence of another office which, in reality, is the principal office. Although CPLR 503(c) refers to "principal office" as opposed to "office of the corporation," the court held these terms to be synonomous.[57]

Since this case is consistent with prior treatment of domestic corporations, little confusion is expected to arise.[58] However, plaintiff's attorneys should bear this ruling in mind in order to maintain control of the setting of venue.

ARTICLE 6 — JOINDER OF CLAIMS, CONSOLIDATION AND SEVERANCE

CPLR 602: Consolidation of actions pending in different inferior courts refused by the supreme court.

It has long been established in New York that a court may order the consolidation of actions pending before it.[59] In addition,

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[54] Mills & Gibb, Inc. v. Starin, 119 App. Div. 336, 104 N.Y. Supp. 230 (1st Dep't 1907); Remington & Sherman Co. v. Niagara County Nat'l Bank, 54 App. Div. 358, 66 N.Y. Supp. 560 (1st Dep't 1900).

[55] 24 App. Div. 2d 757, 263 N.Y.S.2d 470 (2d Dep't 1965).

[56] 7B McKINNEY'S CPLR 503, commentary 6 (1963); 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 503.06 (1965).

[57] General Precision, Inc. v. Ametek, Inc., 24 App. Div. 2d 757, 757-58, 263 N.Y.S.2d 470, 471-72 (2d Dep't 1965).

[58] *E.g.*, Hoffman v. Oxford Developments, Inc., 9 App. Div. 2d 937, 195 N.Y.S.2d 484 (2d Dep't 1959); 7B McKINNEY'S CPLR 503, commentary 6 (1963).

[59] Under the CPLR, any court may, upon motion, consolidate two or more

where an action is pending in either a supreme or county court, each has the power to remove to itself an action pending in any other court for the purposes of consolidation.[60] Under the CPA, it was clear that no court possessed the power to consolidate actions pending in different courts of inferior jurisdiction,[61] but due to recent changes in the CPLR and the state constitution, the unavailability of such relief has been put in issue.

In *Grimaldi v. Graziano*,[62] the defendants sought consolidation of two closely related actions pending respectively in Nassau County District Court and Kings County Civil Court. They moved in the supreme court, praying for removal of both actions to that court, for consolidation while there, and for an order remanding the consolidated action to the civil court. Movants contended that Article VI Section 19(a) of the New York Constitution authorized the legislature to empower the supreme court to effect removal in this situation.[63] Therefore, by virtue of CPLR 325(b), which allows removal where "the court in which an action is pending does not have jurisdiction to grant the relief to which the parties are entitled . . . ," this constitutional authorization was given the force of law. The supreme court rejected this argument, intimating that the legislature would have been far more explicit had it sought to effect so fundamental a change in procedure.[64] Citing a noted text writer,[65] the court acknowledged that the supreme court might have the power to grant such relief, but reiterated that even should it exist, it would best be left unexercised "as a matter of comity."[66]

It is a stated purpose of the CPLR to facilitate the acquisition of consolidation and joint trials for the obvious purposes of expedit-

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actions pending before it if a common question of law or fact is shown to be present. CPLR 602(a). The United States Supreme Court has held that there is an inherent power in a court to consolidate actions pending before it. Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 293 (1892).

[60] CPLR 602(b). See CPA § 97 which was substantially the same.

[61] Curry v. Earll, 209 App. Div. 205, 203 N.Y. Supp. 750 (4th Dep't 1924); Application of Comfort-Zone Corp., 140 N.Y.S.2d 76 (Sup. Ct. Nassau County 1955). *But see* Sutton Carpet Cleaners, Inc. v. Firemen's Ins. Co., 68 N.Y.S.2d 218 (Sup. Ct. Bronx County 1955) where the court removed over 75 actions pending in various lower courts for the purpose of consolidating them with an action pending before it.

[62] 48 Misc. 2d 54, 264 N.Y.S.2d 200 (Sup. Ct. Kings County 1965).

[63] This subsection provides, so far as is relevant, that "as may be provided by law, the supreme court may transfer to itself any action . . . upon a finding that such a transfer will promote the administration of justice."

[64] It will also appear, although the court did not expressly so state, that had the legislature intended to liberalize consolidation procedure, it would have done so through Article 6 rather than Article 3.

[65] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 602.21 (1964).

[66] Grimaldi v. Graziano, 48 Misc. 2d 54, 55, 264 N.Y.S.2d 200, 201 (Sup. Ct. Kings County 1965). *Accord,* In the Matter of Elliotte, 28 Misc. 2d 677, 209 N.Y.S.2d 506 (Sup. Ct. Kings County 1960).

ing litigation and decongesting court calendars. The desirability of such procedure notwithstanding, there are several substantial considerations which justify the court's refusal to grant the relief requested in the instant case. These include: (1) the general propriety of allowing lower courts to administer their own litigation; (2) the policy against burdening the supreme court with further administrative duties; and (3) the absence of guidelines to determine under which circumstances consolidation should be granted and to which inferior court the consolidated action should be remanded.

It is submitted that, by a statute directed at the resolution of the aforementioned obstacles, the legislature could expand the availability of consolidation to encompass the situation presented in the instant case. Whether this would be effected by granting such power to the supreme court or, as would seem more appropriate, to the respective departments of the appellate division, it would be a procedural liberalization in accord with the basic purposes of the CPLR.

ARTICLE 12 — INFANTS AND INCOMPETENTS

CPLR 1201: Plaintiff must establish defendant's inability to defend and nonfeasibility of instituting proceedings for the appointment of a committee before a guardian ad litem will be appointed.

In *Abrons v. Abrons*,[67] the trial court granted plaintiff's motion to have a guardian ad litem appointed for the defendant. The appellate division reversed, relying upon plaintiff's failure to serve notice of the motion upon defendant,[68] and upon the additional grounds that plaintiff neither demonstrated defendant's incapacity nor showed that the institution of proceedings for the appointment of a committee was not feasible.

Under the CPA, it was provided that "a person of unsound mind but not judicially declared incompetent may sue and be sued in the same manner as any ordinary member of the community."[69] CPLR 1201, however, provides that "a person shall appear by a guardian ad litem . . . if he is an adult defendant incapable of adequately protecting his rights." By the incorporation of this section in CPLR 321(a), there is a clear burden cast upon plaintiff

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[67] 24 App. Div. 2d 970, 265 N.Y.S.2d 381 (1st Dep't 1965).

[68] Upon a motion for the appointment of a guardian ad litem, notice must "be served upon the person who would be represented if he is more than fourteen years of age and has not been judicially declared to be incompetent." CPLR 1202(b).

[69] Anonymous v. Anonymous, 3 App. Div. 2d 590, 594, 162 N.Y.S.2d 984, 988 (2d Dep't 1957); see CPA § 236.